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No. 90-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PENNSYLVANIA POWER COMPANY,
Petitioner

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is little need for petitioner Pennsylvania Power Company ("Penn Power") to set forth a point-by-point rebuttal of the arguments raised by the Pennsylvania Public Utility Commission ("PUC") and the Pennsylvania Office of Consumer Advocate ("Consumer Advocate"). Most of respondents' arguments have already been addressed in the petition for certiorari, while others are simply irrelevant to whether review should be granted to consider the question presented: does the lower court's ruling on federal preemption conflict with this Court's decisions in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

Nevertheless, there are a few points raised by respondents that require brief comment. None of these points undermine the view that the petition should be granted.[1]

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[1] Although the issue is not directly relevant, Penn Power strongly disagrees with the Consumer Advocate's claim that the use of the terms "allocations" and "reallocations" in the petition is "seriously misleading to the Court." *See* Consumer Advocate Br. at 3. *See* also PUC Br. at 6-7. As the petition makes clear, Penn Power has used these terms to refer to a distribution of the Perry 1 power between Penn Power and Cleveland Electric, and the redistribution brought about by the Perry 1 buyback. While the Consumer Advocate claims that " 'allocation' is a term of art which applies to a purchase ordered by [FERC]," Consumer Advocate Br. at 3, even the PUC has not limited its use of the term to that context. *See* PUC Br. at 8 (discussing FERC adjustments to "voluntary allocations of power" among affiliates). This Court also has used the term "allocation" when referring to

1. *Respondents' characterization of the PUC's decision is inaccurate.* Respondents frequently describe the PUC's decision as finding both that Penn Power did not "need" any of the power that it purchased, *and* that even if it did need the power, it should have bought that power at a lower price. *See* Consumer Advocate Br. at 5, 7, 13, 24, 26. *See also* PUC Br. at 2, 3. The facts fail to support this characterization.

Whether Penn Power had a "need" for the 12 MW was specifically raised before the PUC in the context of whether this quantity of power constituted "excess capacity." The PUC explicitly found that the 12 MW were not excess capacity, a conclusion that was not disturbed by the Commonwealth Court. *See* App. 28 ("The addition of the 12 MW of capacity does not result in excess capacity"). The PUC determined, however, that Penn Power did not need this amount of power *at the price paid for it*. *See* App. 28a (describing the "sole issue" as "the need for the generation [of the power] and its price in the context of an adjustable rate for the recovery of the costs of energy"). *See also* App. 29a. In short, the supposedly excessive price of the 12 MW was the single reason for the PUC's disallowance; the quantity being purchased was not an alternative basis for the decision.

This reading of the PUC's decision is confirmed by the terms of the disallowance. The PUC ruled that Penn Power was entitled to recover the costs of all 12 MW, but limited this recovery to the price that Penn Power supposedly *should* have paid had it purchased

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a voluntary distribution of power between utilities. *See Mississippi Power*, 487 U.S. at 372.

the power from a lower-priced source. *See* App. 34a. It obviously would have been illogical for the PUC to find—as respondents claim that it did—that Penn Power did not need *any* of the 12 MW, but then allow it to recover a portion of the costs for that *same quantity* of power.[2]

The inaccuracy of respondents' characterization is not just a semantic quibble. Several of respondents' arguments are premised on the notion that the PUC's opinion simply reviewed the quantity of power purchased, *see, e.g.*, Consumer Advocate Br. at 12-13; in fact, however, the PUC concluded that it was imprudent of Penn Power to pay a particular *rate* for the 12 MW, even though Penn Power was obligated to pay that rate, and even though the rate was on file with FERC. It was this decision that could not be second-guessed under principles of federal preemption. *See* Pet. at 9-12. Respondents should not be permitted to disguise the issue by recasting the decision below.[3]

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[2] There is admittedly language in the PUC opinion that, in the abstract, supports respondents' view. *See, e.g.*, App. 28a-29a. The opinion must be considered as a whole, however, and this language must be read in the context of the PUC's entire decision, including the terms of the disallowance.

[3] Respondents' failure to recognize the full basis for the decision below makes many of the cases they rely on inapposite. *See* PUC Br. at 10 nn. 4, 5; Consumer Advocate Br. at 9-12. Even if a state may in some circumstances evaluate the "reasonableness of a utility's wholesale purchasing decisions," Consumer Advocate Br. at 10, it may not, in the guise of evaluating such a decision, interfere with the collection of rates on file with FERC.

2. *FERC has jurisdiction over the 12 MW purchase.* Respondents also claim, incorrectly, that the PUC's decision to disallow a portion of Penn Power's wholesale costs addressed a matter beyond the reach of FERC's jurisdiction. Consumer Advocate Br. at 8-12; PUC Br. at 2. The Consumer Advocate argues that the PUC was only evaluating Penn Power's decision to "buy from a particular seller," and that therefore it only ruled on a matter within the state's exclusive control. *See* Consumer Advocate Br. at 9.

As set forth above and in the petition, respondents' efforts to characterize the PUC's decision as being completely unrelated to the wholesale rate paid for interstate power are unpersuasive. *See* Pet. at 15a-20a. Moreover, the claim that FERC's jurisdiction—and the preemptive effect of that jurisdiction—is not sufficiently broad to reach the PUC's decision here is untenable. Under the Federal Power Act, FERC has jurisdiction not only over all interstate wholesale rates, but also over "all contracts which in any manner affect or relate to such rates." 16 U.S.C. § 824d(c). *See also* §§ 824d(d), 824e, App. 39a, 43a. In this case the agreement between Penn Power and Cleveland Electric voluntarily allocated a portion of the power from Perry 1, at wholesale rates that were filed with FERC. The PUC then disapproved the decision to purchase the 12 MW at that price. Given that the result of the PUC's ruling was to "trap" a portion of Penn Power's wholesale costs, it can hardly be said that such a decision involves a matter over which FERC has no authority.

3. *FERC's preemptive jurisdiction does not turn on whether the utilities in question are affiliated and are members of an integrated power pool; even if it did, the distinction would be irrelevant here.* Respondents' principal argument as to why this case does not conflict with the Court's case law turns on an alleged factual distinction. They claim that Penn Power and Cleveland Electric are not "affiliated" companies, that CAPCO is not an "integrated power pool," and that therefore *Mississippi Power* and *Nantahala* are inapplicable. PUC Br. at 3-5; Consumer Advocate Br. at 15-20. More specifically, the Consumer Advocate argues that the rationale of *Mississippi Power* was intended to apply *only* "where the purchaser is affiliated with the seller and they are members of an integrated power pool." Consumer Advocate Br. at 20.[4]

There are numerous problems with this analysis. First, nothing in the majority opinions of *Mississippi Power* or *Nantahala* limits their rationale to transactions among affiliated members of a power pool. Although the Consumer Advocate discusses at length the concurring and dissenting opinions in *Mississippi Power*, Consumer Advocate Br. at 15-17, his argument finds no support in the opinion of the Court, which focused on the impact of a state's exercise of authority on FERC-filed wholesale rates, rather than the characteristics of the parties. *See Mississippi Power*, 487 U.S. at 374. Thus, even assuming that it is factually accurate to describe the utilities in

[4] The Consumer Advocate goes so far as to say that *Mississippi Power*—which explicitly recognized the broad sweep of FERC's preemptive authority—"made it clear that FERC's jurisdiction over wholesale purchasers was extremely *limited*." Consumer Advocate Br. at 15 (emphasis added).

Nantahala and *Mississippi Power* as affiliated members of power pools, *see* PUC Br. at 3-4, there is no indication that the majority in either case found these facts decisive, or that the Court intended to restrict its rulings to cases where the relationship among the utilities was similar to that among the parties before it.[5]

Second, even if there were a colorable basis for drawing the jurisdictional line as respondents suggest, this confirms, rather than undermines, the need for review by this Court. The alleged special status of affiliated companies who are part of integrated power pools would, if recognized, constitute a significant limitation on FERC's otherwise broad authority. To avoid confusion and needless litigation, the recognition of such a limitation should come from this Court, not from the lower courts or from FERC.

Finally, even if *Mississippi Power* and *Nantahala* were limited to affiliated members of integrated power pools, this distinction should not have a bearing on the current case. Nine large baseload generating facilities in existence today, including Perry 1, are the product of the joint capacity planning, financing, and ownership of CAPCO members.[6] Although the CAPCO agreement does not provide for the central dispatch of these facilities, the production cost savings of central dispatch are effectively captured through capacity and energy interchanges be-

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[5] This alleged limitation on FERC's authority also does not appear in the jurisdictional sections of the Federal Power Act. *See* 16 U.S.C. §§ 824d, 824e.

[6] Because of changed economic circumstances, CAPCO is not currently engaged in the building of new power generating facilities.

tween the CAPCO companies. Moreover, CAPCO members continue to share transmission capability, coordinate maintenance activities on all generating facilities, and provide backup power to ensure that each member receives its proportionate share of jointly-owned capacity. Given this, it is not surprising that the Consumer Advocate's own witness has testified:

> Capacity purchases and sales within a power pool explicitly acknowledge and seek to rectify capacity imbalances by incorporating a capacity charge along with an energy cost in the sales price. The CAPCO Agreement, to which the Ohio Edison System is a signatory, describes several kinds of capacity purchases and sales that are possible for the CAPCO companies to make with each other. *To a considerable extent, CAPCO also acts like a power pool.*

Testimony of Dr. Richard Rosen, No. M-870111, at 26 (Feb. 11, 1988) (emphasis added).

4. *The reliance on Pike County demonstrates the need for further review.* Both the court below and the respondents conclude that under the authority of *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Commw. 268, 465 A.2d 735 (1983), the state remains free to regulate when it is only assessing "the reasonableness of the purchaser's decision" to buy power. *See* App. 18a-20a; Consumer Advocate Br. at 11. Assuming, *arguendo*, that the rule in *Pike County* has some vitality after *Mississippi Power*, the jurisdictional line drawn by that decision is unworkable.

As this case shows, it is difficult in practice to distinguish between state regulatory action that disallows a FERC-filed rate (which is plainly prohib-

ited) from a state ruling that disapproves a purchase of power that is subject to a FERC-filed rate (a permitted practice under *Pike County*). As noted in the petition, the line between permissible and impermissible state regulation apparently can depend on little more than the characterization of the state decision, even though the effect of the regulation on wholesale rates may be the same. *See* Pet. at 19. This is surely the antithesis of an "easily ascertained" line between state and federal jurisdiction that is necessary for the proper working of a federal regulatory scheme.[7] *See Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). *See also Mississippi Power*, 487 U.S. at 374.

This case presents an opportunity for the Court to determine whether the rule embraced in the *Pike County* line of decisions is consistent with recent federal preemption opinions. For this reason and the reasons previously set forth, the petition should be granted.

5. *The Court may wish to hold this petition pending a resolution of New Orleans Public Service Inc. v. Council Of The City Of New Orleans.* Penn Power has noted that the Court recently granted certiorari to consider an issue related to the one raised here.

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[7] One alternative to the practice approved in the courts below that would ensure the integrity of the federal scheme would be to require a party that intends to proceed in a state proceeding under the *Pike County* rationale to present the issue to FERC first. This would ensure the primacy of FERC's authority where wholesale rates would be affected, and would provide uniform treatment of such cases among the states.

See Pet. at 20-22. In *New Orleans Public Service Inc. v. Council Of The City Of New Orleans*, No. 90-1156 (*cert. granted*, April 22, 1991) (*"NOPSI"*), the Court will be asked to interpret the scope of FERC's exclusive authority *vis-a-vis* state utility commissions. More specifically, the Court has agreed to decide whether states are preempted from assessing the reasonableness of a public utility's conduct. when the effect of that assessment is to trap FERC-approved costs that the utility was required to incur. *See* App. 54a. Thus, there is a strong possibility that the opinion in *NOPSI* will have an impact on the validity of the decision below.

Respondents, of course, believe that there is no reason to hold the current petition, primarily because the facts of *NOPSI* involve affiliated utilities in a power pool. *See* PUC Br. at 17; Consumer Advocate Br. at 26-27. For the reasons set forth above, this purported distinction provides no logical or legal basis for denying the petition.[8]

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[8] The Consumer Advocate also relies on the fact that certiorari was recently denied in *Kansas Gas and Electric Co. v. State Corporation Commission*, No. 90-984 (*cert. denied*, June 17, 1991), to support his claim that the current petition should not be held pending *NOPSI*. Consumer Advocate Br. at 27. In *Kansas Gas*, however, the government argued that certiorari should be denied in part because of facts specific to that case. *See Brief for the United States and the Federal Energy Regulatory Commission as Amicus Curiae* at 9 (arguing that case does not present an issue of general importance because the order in question "grew out of the particulars" of the state commission's prior orders). In contrast, whether states have authority to regulate transactions such as the one in this case *does* present an issue of general importance.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court may wish to hold the petition in this case, and dispose of it in light of the Court's decision in *New Orleans Public Service Inc. v. Council Of The City Of New Orleans*, No. 90-1156.

Respectfully submitted,

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